UNITED STATES

# CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

THE FEDERAL MINING & SMELTING COMPANY, a Corporation,
Plaintiff in Error.

vs.

C. H. HODGE,
Defendant in Error.

NO. 2325

REPLY BRIEF OF PLAINTIFF IN ERROR.

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With the permission of the Court we desire to briefly reply to some of the propositions advanced in the brief of the defendant in error in this case:

### FIRST

It is insisted by counsel for defendant in error that we failed to make a motion for a directed verdict at the close of all the testimony in the case. This is not the fact as we

understand it. On Page 119 and 120 of the transcript it will be found that we excepted to the refusal of the Court to grant our requested instruction in the words following: "You are instructed to find a verdict for the defendant in this case." And in our exception assigned as error: First: That there was no actionable negligence shown on the part of the plaintiff in error, and second: That the negligence of the defendant in error contributed to his injury. On Page 120 and 121 of the transcript is found the certificate of the trial Judge to the effect that the foregoing bill of exceptions, including the said exception, is true and correct and to the effect that the Court actually refused the said instruction and that the said exception to the said refusal was true and correct and in the form the said exceptions were made. Our request for said instruction is equivalent to a motion to direct a verdict. To this effect is the case of,—

Detroit Crude Oil Co. vs. Gravle, 94 Fed. 73 (C. C. A. Sixth Circuit).

This was a case where at the close of all the testimony the defendant requested the Court to charge the jury that their verdict must be for the defendant. The Court said, Page 76:

> "The Court also refused the defendant's first request which was in this language: 'Under the evidence in this case, the verdict of the jury must be for the defendant. This request must be regarded as in all respects equivalent to a motion to direct a verdict, for it could have no other purpose or meaning and we accordingly so treat it. The first question with which we deal is raised by the Court's refusal to grant defendant's request to direct a verdict, for this is assigned as error."

And the Court proceeds then to a discussion of the entire case and reverses the case upon the ground that the Court should have granted said instruction.

We therefore say that the question as to whether or not the defendant's contributory negligence in this case bars his recovery as a matter of law is properly raised upon this record and is properly before this Court.

But further than this, in our specifications of the insufficiency of the evidence to sustain the verdict and the judgment thereon we specify that the undisputed evidence conclusively shows that the plaintiff rode upon the bail and cable and at the same time fails to disclose any legal excuse for so doing, and thus also properly raise the question as to whether or not the negligence of the defendant in error was negligence as a matter of law.

## SECOND

It is next contended by counsel for the defendant in error that we did not raise the question in the Court below that the defendant was guilty of contributory negligence in riding upon the bail and cable in violation of a positive statute of the state. We do not admit this at all. As has been shown we repeatedly and strenuously urged in the Court below that the defendant in error in sitting and riding upon the bail and cable of this skip was guilty of such contributory negligence as would bar his right to recover as a matter of law. Contrary to the position which counsel has taken on Page 9 of his brief that the federal courts will not take judicial knowledge of the statute of Idaho, the Supreme Court of the United States has repeatedly held that they and all federal courts will take judicial notice of all state statutes and that it is not necessary to either plead or prove such statutes.

The case of Owings vs. Hull, 9 Peters 607, 9 L. Ed. 246, is

very much in point. This was a case where an objection was made in the lower court to the introduction of the copy of an instrument for the reason that no proof had been made why the original was not produced. The validity of this objection depended upon a statute of the State of Louisiana. The Supreme Court of the United States on Page 625 of the United States Reports, and Page 252 of the L. Ed., say:

> "We are of opinion that the Circuit Court was bound to take judicial notice of the laws of Louisiana. The Circuit Courts of the United States are created by Congress not for the purpose of administering local law of a single state alone but to administer laws of all the states in the Union, in cases to which they respectively apply. The judicial power conferred on the general government by the constitution extends to many cases arising under the laws of the different states. And this Court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the states. The jurisprudence is, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts."

Can it be contended for a moment that if this were a statute of the United States that the Court below did not err in disregarding the statute because, perchance, the statute was not called to the specific attention of the Court or that this Court cannot give effect to that statute because the record does not disclose that this statute was specifically called to the attention of the Court below. The lower Court is conclusively presumed

to have had knowledge of this statute and it is to be conclusively presumed in this Court that the action of the Court in refusing to take this case away from the jury was had with a knowledge on the part of the Court that this law existed.

So in the case of,

Mills vs. Green, 159 U. S. 651, 40 L. Ed. 293,

The Supreme Court say:

> "The election of delegates and the assembling of the convention are public matters, to be taken notice of by the Court without formal plea or proof. The lower courts of the United States, and this Court, on appeal from their decisions, take judicial notice of the constitution and public laws of each state of the Union. (Citing numerous cases). Taking judicial notice of the constitution and laws of the state, this Court must take judicial notice of the days of general public elections of members of the legislature or of a convention to revise the fundamental law of the state as well as of the times of the commencement of the sitting of those bodies, and of the dates when their acts take effect. (Citing numerous cases)."

In Lamar vs. Micou,

114 U. S. Page 218, 29 L. Ed. 94,

The Supreme Court says:

> "The law of any state of the Union, whether depending upon the statutes or upon judicial opinions, is a matter of which the Courts of the United States are bound to take judicial notice without plea or proof. (Citing cases)."

And again in the case of,—

Pennington vs. Gibson, 16 Howard 66, 14 L, Ed. 847, at Page 81 of the U. S. Reps. and at Page 853 of the L. Ed.

Say:

> "And in further confirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several states of this Union, and with respect to these nothing is required to be specifically avered in pleading which would not be so required by the tribunals of those states respectively."

The cases which counsel has cited that an appellate court will not review questions which were not presented to the Court below, and which are presented for the first time on appeal, are not in point. This principle we not only concede, but approve. It is our contention, however, that we did present the question below, and this question is: *Was the defendant's conduct in sitting upon the bail and cable contributory negligence as a matter of law?* And the question below was not as to the existence of the statute. The statute is cited now merely as showing that the point made below was well taken because there was a violation of it.

The case of the City of Findlay vs. Pertz, 74 Fed. 681, is not in point. The statute in that case made the contract void, but the validity of the contract either under this statute or otherwise, was never raised in the Court below. Various defenses were set up to the contract, but never was it said below that the contract was invalid and there was no assignment of error whatsoever directing the attention of the court

below or the appellate court, to the invalidity of the contract. The Court therefore said:

> "To have obtained the benefit of a consideration of this question (*namely as to whether or not the contract was void under the statute*) it should have been presented to the trial court *in some form.*"

In the case at bar, however, the question as to whether or not the position of the defendant in error in riding upon the bail and cable constitutes contributory negligence per se was squarely presented to the court who had judicial knowledge of the existence of the statute prohibiting the plaintiff from riding thereon, and we cannot conceive how it may now be argued that the Court below could have brushed aside his judicial knowledge of this statute in deciding this question; and that he did not commit error in failing to give the statute its full force and effect because, perchance, the Court below may have forgotten the text of the statute or that the same was not specifically called to his attention. As well might it be argued that we could not present judicial opinions to your honors upon this or any other point of law, because forsooth we did not call them to the trial court's attention.

## THIRD

It is next urged by counsel, although inferentially only, that we should not be permitted to set up the violation by the defendant in error of the positive inhibition of this statute, which prohibits him from riding upon the bail and cable of the hoist, by reason of the fact that the plaintiff in error itself had

failed to comply with Section 12 of the same act, which requires each hoist to be equipped with an indicator. In other words it is inferentially contended that contributory negligence is no defense where the basis of the master's alleged negligence is the violation by him of a statute. This is not the law, and the Supreme Court of the United States in the case of,—

Schlemmer vs. Buffalo, etc., R. Y. Co., 220 U. S. 590, 55 L. Ed. 596.

holds the opposite doctrine.

In that case it appeared that a shovel car was not equipped with an automatic coupler as required by the Act of March 2, 1893, Chapter 196, Paragraph 2, 27 Stat. At. L. 531, U. S. Com. Stat. 1901, Page 3174, and that fact was the basis of the action for damages. It appeared further that the statute expressly excluded the defense of assumption of risk. But in regard to the defense of contributory negligence the Court say:

> "But there is nothing in the statute absolving the employe from the duty of using ordinary care to protect himself from the injury in the use of the car with the appliances actually furnished. In other words, notwithstanding the company failed to comply with the statute, the employe was not for that reason, absolved from the duty of using ordinary care for his own protection under the circumstances as they existed. This has been the holding of the courts in construing statutes enacted to promote the safety of employes. (Citing numerous cases)."

And the Court in that case held that the plaintiff was barred from recovery by his contributory negligence as a matter of law. To the same effect is,

Denver, Etc., R. Co. vs. Arrighi, 121 Fed. 347, 63 C. C. A. 649, Eighth Circuit,

Cleveland etc. R. Co. vs. Baker, 61 Fed. 224, 33 C. C. A. 468.

Gilbert vs. Chicago etc. R. Co., 123 Fed. 832, Affirmed 128 Fed. 529, 63 C. C. A. 27.

It seems unnecessary to cite any further cases upon this point as it is sustained, as far as we are aware, by all authorities and we will content ourselves with saying that the following states have enunciated the same principles: Delaware, Indiana, Massachusetts, Minnesota, Texas, Rhode Island, Vermont, Washington, New Jersey, Michigan, Pennsylvania, New York, Wisconsin, Kansas, Missouri, Montana, North Carolina, Louisiana and Iowa.

## FOURTH

There is one more proposition set up in respondent's brief and that is as to the rulings of this Court respecting contributory negligence as announced in the case of,—

Alaska United Mine Gold Co. vs. Keating, 116 Fed. 561.

And the case of

Olson vs. Cook Inlet Coal Fields, 121 Fed. 726.

In the Olson case the plaintiff was sitting on the rear end of a small engine between it and the car. This was not obviously a dangerous place in which to sit nor a place where a reasonably prudent man might have anticipated danger, nor

could it have been foreseen by him or anyone else that an accident of this character should have happened to him. The Olson case, in our judgment, is not at all in point, and if in that case it could be at all contended that the plaintiff voluntarily assumed a dangerous position, it certainly was a question for the jury.

As far as the Keating case is concerned this Court held that the accident to Keating was directly due to the failure of the master to lower the bucket empty for the purpose of determining whether or not the shaft was clear from obstruction. This was the direct and proximate cause of the accident. Nothing in that case indicates that the accident would not have happened had the plaintiff not stood where he did. It was the jar of the bucket coming in contact with the obstruction in the shaft which threw him from this position just as it might have thrown him had he stood or sat anywhere else in or upon the bucket. His position was not therefore necessarily the proximate cause of the accident and did not necessarily contribute to the accident.

It is not contended by us that the mere sitting upon a bail or cable precludes a plaintiff from recovering where an accident happens in a skip and where it is not shown that the position which he has taken contributes to his injury. We can also conceive of cases where a question arises as to whether or not such a position contributed to the accident, in which event it is proper to submit such matter to the jury for determination; but where the evidence shows, as in the case at bar, that the accident could not and would not have happened had the plaintiff not voluntarily assumed an obviously dangerous place and one which is prohibited by a statute, then we say that he comes squarely under the decision

of the Supreme Court in the case of Jones against the Railway Company, and his position is contributory negligence as a matter of law.

And further than this, in the case at bar, as we have already seen the failure to have an indicator upon the skip was not the proximate, or any cause for the accident, but the real cause of this accident was, First: That the appliances, such as they were, were being operated in an unskillful and dangerous manner, to-wit, by running the hoist at too great a rate of speed, so that the men upon the hoist could not give an adequate signal and Second: The defedant in error's position in placing himself upon the bail and cable in such a way that the accident was caused thereby. It can be demonstrated to a certainty that the accident would not have happened, despite the fact that there was no indicator upon the skip had these appliances been used in a proper manner, and had the plaintiff taken a seat in the body of the skip where he belonged, instead of riding upon the bail and cable thereof in violation of statute, and in violation of the duty which he owed to himself and to his master to use reasonable care and prudence not to place himself unnecessarily in harm's way.

We strenuously urge that there is no analogy whatsoever between the Keating case and the case at bar. In the Keating case the position taken by the plaintiff was ordinarily safe and was rendered dangerous only by the fact that the master had failed to discover an obstruction in the shaft. Keating's particular position upon the bucket was simply an incident in the event of the accident and was in no sense a cause of the accident and not a contributory factor thereto; at least there was such grave question in that case as to whether or not Keating would have been injured had he stood elsewhere

upon the bucket that it was properly a case to go to the jury. But, as has been seen, in the case at bar it has been demonstrated to almost a mathematical certainty that the defendant in error unnecessarily and without excuse placed himself in a position which courted accident which would positively not have happened to him had he placed himself within the skip. The position assumed by the defendant in error of lying in a cramped position upon the bail and cable of this skip, which was being hoisted at the rate of more than 250 feet per minute, was so obviously dangerous that we cannot conceive how our position in this matter can be questioned. Such position certainly is a hundred times more dangerous than sitting on the pilot of an engine as was done in the Jones case, or sitting on the end of a flat car, which has been held to be negligence per se in the cases cited in our main brief. If your honors can conceive of a man riding up that incline, lying upon the bail and cable of the skip with nothing between him and the incline but a bail and cable, I think you will agree with us that nothing but recklessness and the contempt for danger, which familiarity therewith so often breeds, could have induced the defendant in error to take such a position.

Respectfully submitted,

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